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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/082,849	02/26/2002	Neal Zahn	WIN825/01830	6832
24118	7590	01/24/2005	EXAMINER	
HEAD, JOHNSON & KACHIGIAN 228 W 17TH PLACE TULSA, OK 74119			MARX, IRENE	
			ART UNIT	PAPER NUMBER
			1651	
DATE MAILED: 01/24/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/082,849

Applicant(s)

ZAHN ET AL.

Examiner

Irene Marx

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1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 03 January 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,2,11 and 12 is/are pending in the application.
- 4a) Of the above claim(s) 11 and 12 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-2 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

The amendment filed 12/13/04 is acknowledged.

Claims 1-2 are being examined on the record. Claims 11-12 are withdrawn from consideration.

This application contains claims 11-12 drawn to an invention nonelected with traverse in Paper No. filed 11/28/03. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-2 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 is vague and indefinite that the origin and/or nature of the “catabolic breakdown products” cannot be determined. Accordingly, the nature and properties of the “fermentation composition” as claimed cannot be readily determined.

The terminology “fermentation composition” does not clarify whether the composition as claimed is the product of a fermentation process or a product ready to be fermented in an aquatic environment. The process of comminuting does not produce a “fermentation product”.

Therefore the metes and bounds of the invention are unclear.

Response to Arguments

Applicant's arguments have been fully considered but they are not deemed to be persuasive.

Applicant argues that “the rejections under 35 U.S.C. 112 have been addressed by amendments to independent claim. However, this amendment does not address the rejection made regarding the origin of “catabolic breakdown products”. Moreover, applicant did not address the use of the terminology “fermentation composition”.

Therefore the rejection is deemed proper and it is adhered to.

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Claims 1-2 are/remain rejected under 35 U.S.C. 103(a) as being unpatentable over Ely *et al.* taken with Richards *et al.* and Jeffreys for the reasons as stated in the last Office action and the further reasons below.

Response to Arguments

Applicant's arguments have been fully considered but they are not deemed to be persuasive.

Applicant argues that the rejection is overcome by the amendment, but does not address the rejection or the reasons why it is believed to be overcome.

Even though the references do not disclose the specific a composition comprising the specific amount of barley straw as now claimed and wherein specific species of *Bacillus* are recited, it is noted that the rejection made is not an anticipation rejection, but rather an obviousness rejection. In addition, Ely discloses a fermentation composition produced by culturing *Bacillus subtilis* on wheat bran. It is apparent that the "fermentation composition" produced is substantially similar to the instantly claimed "fermentation composition" wherein the raw material is barley straw. The extent of the degradation of the raw material, for example, cannot be readily assessed from the claims as written, since the nature of the "fermentation composition" intended is not readily ascertainable from the as claimed invention.

It is noted that Applicant has not provided evidence to demonstrate that the claimed composition is different from and has unexpected properties over the products taught by the references, wherein ubiquitous *Bacillus* species such as *B. subtilis* and *B. megaterium* are included, as well as associated hydrolytic enzymes and catabolic products are reasonably presumed to be present.

Applicant has not demonstrated that the recited range of barley straw produces unexpected results in conjunction with the recited bacteria in a "fermentation composition". While the touted compositions as produced in the as filed specification are produced with very specific process steps and under specific process parameter, the claimed invention is directed to any "fermentation compositions" produced in any unknown manner and the properties of which cannot be assessed. It is noted that the products of the references are similarly "fermentation compositions" that are in dry granular form.

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For example, there is no clear correlation between the invention as claimed and the unexpected results argued previously. For example, counsel has argued that the claimed composition can be made in 90 hours and the reference compositions cannot. The arguments by counsel in this regard have not been substantiated with appropriate evidence. It is well settled that arguments by counsel do not constitute evidence. It is apparent that the reference compositions and the claimed compositions have very similar, if not the same, components. Therefore, one of ordinary skill in the art would reasonably have expected a similar process of making. This process is not part of the invention as claimed, in any event. In addition, arguments directed to the clarification of water are not relevant to the invention as claimed. It is also noted that the addition of fertilizer to water and concomitant pollution are unrelated to the compositions in the references or the composition as claimed.

The scope of the showing must be commensurate with the scope of claims to consider evidence probative of unexpected results, for example. In *re* Dill, 202 USPQ 805 (CCPA, 1979), In *re* Lindner 173 USPQ 356 (CCPA 1972), In *re* Hyson, 172 USPQ 399 (CCPA 1972), In *re* Boesch, 205 USPQ 215, (CCPA 1980), In *re* Grasselli, 218 USPQ 769 (Fed. Cir. 1983), In *re* Clemens, 206 USPQ 289 (CCPA 1980). It should be clear that the probative value of the data is not commensurate in scope with the degree of protection sought by the claim.

Therefore, the rejection is deemed proper and it is maintained.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

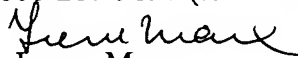
A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Irene Marx whose telephone number is (571) 272-0919. The examiner can normally be reached on M-F (6:30-3:00).

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael G. Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300 .

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Irene Marx
Primary Examiner
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